Supreme Court, U.S.
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No. 00-____

IN THE

# SUPREME COURT OF THE UNITED STATES

STATE OF ALABAMA,

*Petitioner,*

v.

LEREED SHELTON,

*Respondent.*

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In the light of the "actual imprisonment" standard established in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and refined in *Scott v. Illinois*, 440 U.S. 367 (1979), does the imposition of a suspended or conditional sentence in a misdemeanor case invoke a defendant's Sixth Amendment right to counsel?

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The State of Alabama respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court vacating the defendant's suspended sentence as violating his Sixth Amendment right to counsel.

## DECISIONS BELOW

The decision of the Alabama Court of Criminal Appeals can be found at *Shelton v. State*, CR-97-1313, 1999 WL 339284 (Ala. Crim. App. May 28, 1999) (Pet. App. 6–24). The decision of the Supreme Court of Alabama is found at *Ex parte Shelton*, No. 1990031, 2000 WL 1603806 (Ala. May 19, 2000) (Pet. App. 27–37).

## STATEMENT OF JURISDICTION

The decision of the Alabama Supreme Court vacating Shelton's suspended misdemeanor sentence was entered on May 19, 2000. A petition for rehearing was denied on October 27, 2000. Pet. App. 40–44. The State invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## STATEMENT OF THE CASE

The State of Alabama submits this petition to obtain review of a decision by the Alabama Supreme Court holding that the receipt of a suspended sentence in a misdemeanor case invokes a defendant's Sixth Amendment right to counsel. Adjudication of this issue in federal circuit courts and state courts has led to conflicting outcomes. The majority of federal circuit courts and state courts agree that a probationary or suspended sentence merely amounts to a "threat of imprisonment" and does not mandate appointment of counsel. This split of authority, coupled with the importance of establishing a uniform guideline for evaluating Sixth Amendment claims, necessitates certiorari review.

After LeReed Shelton (Shelton) was adjudged guilty of third degree assault, a misdemeanor offense, while representing himself in the Etowah County District Court



of Alabama, Shelton appealed the conviction for a trial de novo in circuit court. (C. 2, 12.)[1] Shelton proceeded, pro se, to trial in the Etowah County Circuit Court, where a jury convicted him of the same crime. (C. 2, 12; R. 2.)[2] The trial judge sentenced Shelton to serve thirty days in the Etowah County Detention Center, then suspended the term, imposing two years' unsupervised probation. (C. 16.) As a condition of probation, Shelton was required to pay various financial levies to the clerk within thirty days. (C. 16.)

In the Alabama Court of Criminal Appeals, Shelton asserted his misdemeanor conviction was void because he did not waive his right to counsel. Although the Alabama Court of Criminal Appeals initially agreed with Shelton, Pet. App. 3–4, after a remand of the case, the court reversed its decision, ruling that a defendant is not constitutionally entitled to counsel for a misdemeanor offense in which a suspended or conditional sentence is imposed, Pet. App. 7–12.

Shelton filed a petition for a writ of certiorari in the Supreme Court of Alabama, which the court granted on December 13, 1999. In a 6-to-1 decision, the Alabama Supreme Court affirmed Shelton's conviction, but reversed his thirty-day suspended jail term. Pet. App. 27–37. Finding that "[n]either *Argersinger* nor *Scott* addressed the issue . . . whether a suspended or probated sentence to imprisonment constitutes a 'term of imprisonment[,]' " the supreme court considered conflicting federal and state decisions on the issue. Pet. App. 33–34. The Alabama Supreme Court, selecting the reasoning expressed in *United States v. Reilley*, 948 F.2d 648 (10th Cir. 1991), that a conditional threat of imprisonment imposed in an uncounseled misdemeanor

[1] "C." refers to the clerk's record on appeal.
[2] "R." refers to the court reporter's transcript.

case "could never be carried out" and thus, was "invalid," ruled that Shelton "was entitled to representation by counsel because he was sentenced to a term of imprisonment, albeit suspended." Pet. App. 33–35. "Having held that a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel," and discovering no evidence in the record that Shelton " 'was offered counsel[,]' " the supreme court "found that Shelton did not intelligently and understandingly waive that right and that he suffered a deprivation of that right . . . [and] reverse[d] that aspect of his sentence imposing 30 days of suspended jail time." Pet. App. 35–37. In dissent, Justice Maddox asserted that, "because the defendant received only a suspended sentence and was not incarcerated . . . he . . . [did not have] a right to counsel." Pet. App. 38–39. The State filed an application for rehearing, which the Alabama Supreme Court denied on October 27, 2000. Pet. App. 40–44.[3]

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[3] The Alabama Supreme Court slightly modified its original opinion on rehearing by including additional commentary in its second footnote; this information has been added to the court's May 19, 2000, released opinion.



## REASONS FOR GRANTING THE PETITION

### I. FEDERAL CIRCUITS AND STATE SUPREME COURTS ARE DIVIDED AS TO WHETHER IMPOSITION OF A SUSPENDED OR CONDITIONAL SENTENCE IN A MISDEMEANOR CASE INVOKES A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Commencing with the decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), this Court determined that the "actual deprivation of liberty" invoked the Sixth Amendment right to counsel. *Id.* at 32–34, 40. In *Scott v. Illinois*, 440 U.S. 367 (1979), this Court unequivocally embraced "actual imprisonment as the line defining the constitutional right to appointment of counsel" and rejected the "mere threat of imprisonment" as invoking that guarantee. *Id.* at 373. *Scott* was recently reaffirmed in *Nichols v. United States*, 511 U.S. 738 (1994), where this Court extended the "actual imprisonment" requirement by recognizing the validity of "an uncounseled misdemeanor conviction" as it was "used to enhance punishment at a subsequent conviction." *Id.* at 748–49. Likewise, in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), while discussing indigents' access to the courts, this Court emphasized the right to counsel "does not extend to nonfelony trials if no term of imprisonment is actually imposed." *Id.* at 113.

The Second, Fourth, Fifth and Sixth Circuits and the supreme courts of Michigan, Virginia and Montana have strictly construed the *Scott* "actual imprisonment" standard, holding that a defendant is not constitutionally entitled to counsel in a misdemeanor case where a suspended or conditional sentence is imposed. Conversely, the Eighth and Tenth Circuits and the supreme courts of Alabama and Vermont have reasoned that imposition of a suspended or conditional sentence

mandates legal representation. These conflicting judgments have resulted in incongruous rationales and outcomes in the federal circuit courts and state supreme courts. Based on the inconsistent results among these courts, this Court should grant certiorari to resolve whether a defendant who receives a suspended or conditional sentence in a misdemeanor case is entitled to legal representation.

Before this Court's decisions in *Scott* and *Nichols*, the Fifth Circuit held that a definite loss of liberty was required before a defendant was entitled to counsel in a misdemeanor case. *Cottle v. Wainwright*, 477 F.2d 269, 275 (5th Cir. 1973), *vacated on different grounds*, 414 U.S. 895 (1973). In *Cottle*, the Fifth Circuit held that the Florida Parole Commission could use an uncounseled North Carolina conviction that had resulted in a 20-day suspended sentence to revoke parole. Building on the statements in *Argersinger* that counsel was only required when a misdemeanor "en'l[ed] up in the actual deprivation of a person's liberty," 407 U.S. at 40, the Fifth Circuit upheld the validity of the uncounseled misdemeanor conviction, ruling that a suspended sentence is not tantamount to "actual imprisonment." *Cottle*, 477 F.2d at 275.

The Second, Fourth, and Sixth Circuits agree with the Fifth Circuit, reasoning that a probationary or suspended sentence merely amounts to the "threat of imprisonment," which this Court rejected as meriting counsel in *Scott*. *United States v. Castro-Vega*, 945 F.2d 496, 499 (2d Cir. 1991) (uncounseled prior misdemeanor resulting in probationary sentence used to calculate criminal history at sentencing), *cert. denied*, 507 U.S. 908 (1993); *United States v. Jackson*, 605 F.2d 1319, 1320 (4th Cir. 1979) (no right to counsel with imposition of 90-day probationary sentence for a misdemeanor assault); *United States v. Smith*, No. 94-5627, 1995 WL 314892, at *2 (6th Cir. May



23, 1995) (unpublished opinion) (prior uncounseled misdemeanor conviction resulting in suspended sentence used to calculate criminal history), *cert. denied*, 516 U.S. 897 (1995). The Eleventh Circuit accepts the decisions of the Fifth Circuit as binding precedent,[4] and, thus, joins the Second, Fourth, Fifth, and Sixth Circuits in accepting that a conditional or suspended sentence is not "actual imprisonment." *Cf. United States v. Peagler*, 847 F.2d 756, 758 (11th Cir. 1988) (sentencing court may consider uncounseled misdemeanor convictions where defendant was not imprisoned).

In addition to these circuit courts of appeals, the supreme courts of Michigan, Virginia and Montana construe *Scott*'s "actual imprisonment" language to indicate that, absent incarceration for a conviction, no counsel is mandated. *People v. Reichenbach*, 587 N.W.2d 1, 3–7 (Mich. 1998) ("The plain meaning of the words 'actual imprisonment,' as well as the words 'mere threat of imprisonment,' dictate the conclusion that defendant's conditional sentence did not constitute 'actual imprisonment.' "); *Griswold v. Commonwealth*, 472 S.E.2d 789, 789–91 (Va. 1996) (defendant's previous uncounseled misdemeanor conviction resulting in suspended sentence was not "actual imprisonment"); *State v. Hansen*, 903 P.2d 194, 197 (Mont. 1995) (holding suspended sentence does not create a constitutional right to counsel).

In stark contrast, the Eighth and Tenth Circuits hold that a suspended sentence demands appointment of counsel. *United States v. White*, 529 F.2d 1390, 1393-1394 n.4 (8th Cir. 1976) (striking 90-day suspended

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the United States Court of Appeals for the Eleventh Circuit held that "the decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981 . . . shall be binding precedent in the Eleventh Circuit."

sentence imposed in uncounseled misdemeanor case); *United States v. Reilley*, 948 F.2d 648, 654 (10th Cir. 1991) (striking suspended sentence of imprisonment in uncounseled case). The Alabama Supreme Court and the Vermont Supreme Court have joined this faction. Pet. App. 33–35; *State v. Brown*, 676 A.2d 350, 354 (Vt. 1996) (defendant cannot be denied appointment of counsel, then subsequently receive a suspended sentence).

This Court established the unequivocal benchmark of "actual imprisonment" as triggering the right to counsel in misdemeanor cases. The minority position, adopted by the Alabama Supreme Court, disregards that standard and invites reversal. This Court should grant certiorari to resolve the conflict among the federal circuit and state supreme courts.

## II. THE SIXTH AMENDMENT RIGHT TO COUNSEL REQUIRES A NATIONALLY UNIFORM INTERPRETATION.

This Court has repeatedly drawn a prominent distinction in misdemeanor cases between the "mere threat of imprisonment" and the imposition of "actual imprisonment." Two federal circuit courts and two supreme courts, including the Alabama Supreme Court, have enlarged defendants' right to counsel by failing to apply the *Scott* bright-line "actual imprisonment" test, and in so doing, have undermined, and will continue to undermine, this Court's intent to avoid the imposition of counsel in the "run of misdemeanors."

Inconsistencies in the *Scott* interpretations among federal circuit courts and state supreme courts lead to disparate results and inequitable treatment of defendants based solely on the jurisdiction where misdemeanor prosecution occurs. Such discrepancies thwart



consistency of punishment and upset the efficacy of this Court's precedent.

The State of Alabama urges this Court to grant certiorari and reverse the decision of the Alabama Supreme Court to resolve the existing conflicts and to ensure a nationally uniform interpretation of the right to counsel in misdemeanor cases when the sentence imposed is suspended or probated.

## CONCLUSION

The petition for a writ of certiorari to the Alabama Supreme Court should be granted.

Respectfully submitted,

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January 25, 2001

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**ALABAMA COURT OF CRIMINAL APPEALS**

**OCTOBER TERM, 1997-98**

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**CR-97-1313**

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Released October 2, 1998

Lereed Shelton
v.
State
Appeal from Etowah Circuit Court
(CC-97-0365)

BASCHAB, JUDGE

The appellant, Lereed Shelton, was convicted in district court of third-degree assault, §13A-6-22, Ala. Code 1975. He appealed his conviction to the Etowah Circuit Court for a trial de novo, and he was again convicted of third-degree assault. The circuit court sentenced him to 30 days imprisonment, but suspended the sentence and placed him on

unsupervised probation for two years. The circuit court also ordered the appellant to pay $516.69 restitution as a condition of his probation. This appeal followed.

I.

The appellant argues that the prosecutor's complaint was void because it did not allege an essential element of third-degree assault. Specifically, he contends that the complaint was deficient because it did not include the language "to another person" in describing the intent element of the offense. The complaint alleged that the appellant,

> "with the intent to cause physical injury and did cause physical injury to Kenney L. Campbell by beating him with his fist, in violation of 13A-6-22 of Code of Alabama 1975."

(C.R. at 13.) Section 13A-6-22, Ala. Code 1975, provides:

> "(a) A person commits the crime of assault in the third degree if:
>
> > "(1) With intent to cause physical injury to another person, he causes physical injury to any person."

"[A] complaint that substantially tracks the language of the statute is sufficient to inform the defendant of the charges against which he must defend." Gentile v. City of Guntersville, 589 So.2d 809, 810 (Ala. Cr. App. 1991) (emphasis added). Although a minor variation between the language in the complaint and the language of §13A-6-22, Ala. Code 1975, exists, the complaint substantially tracks the language of the



statute. Furthermore, the complaint contains sufficient facts and a sufficient description of the elements to " 'inform the [appellant] of the charge so that [he] may prepare a defense and invoke the Double Jeopardy Clause when appropriate.' " See Hunt v. State, 642 So.2d 999, 1022 (Ala. Cr. App. 1993), aff'd, 642 So.2d 1060 (Ala. 1994) (quoting Daniel F. McInnis et al., Project, Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992, 81 Geo. L. J. 853, 1076-81 (1993)). The complaint does not include the words "to another person" in regard to intent. However, the language of the complaint was sufficient to apprise the appellant that the intent to cause physical injury was an element of the offense of third-degree assault so that he could formulate a defense to that charge. Because the complaint contains all the essential elements of the charge, it is valid.

II.

Next, the appellant argues that his rights were violated because the record does not reflect that he knowingly, intelligently, and voluntarily waived his right to counsel. The State argues that the appellant did not have a right to counsel. Therefore, it argues that no waiver was necessary. The appellant was convicted of third-degree assault, a Class A misdemeanor. See §13A-6-22, Ala. Code 1975. The right to counsel does not attach in a misdemeanor case if " ' "the defendant is not sentenced to a term of imprisonment. If an uncounseled defendant is sentenced to prison [or jail], the conviction itself is unconstitutional." ' " Williams v. City of Phenix City, 659 So.2d 1004, 1005 (Ala. Cr. App. 1995) (quoting Minnifield v. City of Alexander City, 616 So.2d 403 (Ala. Cr. App. 1993)); see also Rule 6.1, Ala. R. Crim. P., committee comments (stating that "the right to

counsel in misdemeanor cases is limited to cases in which the defendant is actually sentenced to jail"). The circuit court sentenced the appellant to 30 days imprisonment, but suspended the sentence and conditioned probation on the payment of fines, costs, and restitution. The constitutional right to counsel applies in misdemeanor cases where the appellant's sentence of imprisonment is suspended conditionally. Williams v. City of Phenix City, 659 So.2d at 1006 (holding that "a conditionally suspended sentence of imprisonment cannot be imposed on an indigent [in a misdemeanor case] who is denied counsel"); see also Culberson v. State, 709 So.2d 1327 (Ala. Cr. App. 1997) (holding that Culberson, who had been sentenced to two suspended terms of imprisonment, had a constitutional right to counsel). Therefore, the appellant had a constitutional right to counsel.

"A defendant may always waive the right to counsel but 'the waiver must be intelligently and understandingly made, and [the court] cannot assume that to be the case from a silent record.' " Culberson, 709 So.2d at 1328 (quoting Lake v. City of Birmingham, 390 So.2d 36, 38 (Ala. Cr. App. 1980)); see Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). " ' "If the record is not clear as to the defendant's waiver [of counsel] and request of self-representation, the burden of proof is on the State" ' " to show the waiver was knowing, intelligent, and voluntary. Watkins v. State, 708 So.2d 236, 240 (Ala. Cr. App. 1997) (emphasis omitted). Nothing in the record indicates that the appellant knowingly, understandingly, and voluntarily waived his right to counsel. Therefore, we remand this case for the circuit court to determine whether the appellant made a knowing, intelligent, and voluntary waiver of his right to counsel. The circuit court shall take the necessary action to see that the circuit clerk makes due return to



this court at the earliest possible time and within 42 days of the release of this opinion. The return to remand shall include any transcripts or documents that support the circuit court's findings.

REMANDED WITH INSTRUCTIONS.

Long, P.J., and McMillan, Cobb, and Brown, JJ., concur.

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STATE OF ALABAMA - - -
JUDICIAL DEPARTMENT

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1998-99

Released May 28, 1999

CR-97-1313

Lereed Shelton
v.
State
Appeal from Etowah County Circuit Court
(CC-97-365)

On Return to Remand

COBB, JUDGE

This case was originally assigned to another judge. It was reassigned to Judge Cobb on March 11, 1999.

The appellant, Lereed Shelton, was convicted of third-degree assault in the district court. See §13A-6-22, Ala. Code 1975. He appealed his conviction to the



Etowah Circuit Court for a trial de novo; he was again convicted of third-degree assault. The circuit court sentenced him to 30 days' confinement, but suspended the sentence and placed him on unsupervised probation for two years. As a condition of his probation, Shelton was also ordered to pay a $500 fine, court costs, and $516.69 in restitution, as a condition of his probation. In this opinion, we address the trial court's order on return to remand and the issues raised by Shelton that we did not address in our first opinion. See Shelton v. State, [Ms. CR-97-1313, October 2, 1998] ___ So.2d ____, ____ (Ala.Cr.App. 1998).

I.

On October 2, 1998, we remanded this cause for the trial court to determine whether the appellant made a knowing, intelligent, and voluntary waiver of his right to counsel. In its order on return to remand, the trial court made the following findings:

> "1. Although the Defendant never made a statement on the record specifically waiving his right to counsel, it is the opinion of this Judge that the Defendant fully understood his right to employ counsel and in fact did a creditable job of defending his own case both at the District and Circuit Court levels.
>
> "2. Repeatedly during the trial of his case, the Court informed the defendant about the problems of [his] representing himself and the fact that he was a lay-person would not allow him to circumvent the rules of evidence.
>
> "3. The defendant appeared to be an intelligent, articulate, shrewd businessman fully aware of

what was going on in the courtroom and aware of the criminal charge against him and the possibilities of punishment (he was found guilty in District Court and received a fine and [was] ordered to pay restitution)."

In our October 2 opinion, we held that Shelton has a constitutional right to counsel. See Shelton, ___ So.2d at ____. However, in so holding, we overlooked clear precedent to the contrary. Upon reconsideration, we find that Shelton did not have a Sixth Amendment right to counsel because he did not receive a sentence that resulted in actual confinement.

We apply the same rationale we applied in Benson v. City of Sheffield, [Ms. CR-98-0280, April 30, 1999] ____ So.2d ____, ____ (Ala.Cr.App. 1999):

"In Argersinger v. Hamlin, 407 U.S. 25, 37-40 (1972), the United States Supreme Court held:

" '[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial.

"....

" 'Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.



" 'The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy.' "

The Argersinger Court expressly reserved ruling on "the requirements of the Sixth Amendment as regards the right to counsel where [actual] loss of liberty is not involved." Id. at 37. In Scott v. Illinois, 440 U.S. 367, 373 (1979), the United States Supreme Court affirmed an indigent appellant's conviction for theft; the conviction was obtained without the benefit of counsel in a case where the only punishment imposed was a $50 fine, although imprisonment was authorized. The Court wrote:

"[T]he central premise of Argersinger -- that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment -- is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointed counsel."

In Salter v. State, 470 So.2d 1360, 1362 (Ala.Cr.App. 1985), this court held that "the constitutional right to counsel is limited to criminal offenses resulting in actual imprisonment." This court followed the guidelines set out in Argersinger and Scott and chose not to enlarge the rights of those persons convicted of misdemeanors who were not sentenced to actual imprisonment.

We cited this same caselaw in Jowers v. City of Selma, 688 So.2d 278 (Ala.Cr.App. 1996), in deciding a case with similar circumstances. In holding that the

appellant did not have a right to counsel in a misdemeanor case in which the sentence was suspended, we wrote:

> "[The defendant's] sentence of probation does not constitute actual imprisonment. Therefore, under Argersinger, Scott, and Salter, [the defendant's] Sixth Amendment rights were not violated. If in the future, the trial court revokes [the defendant's] probation and sentences him to jail, that revocation may constitute a violation of [the defendant's] Sixth Amendment right to appointed counsel. However, we will not reverse the trial court on the mere possibility that, at a remote and future date, [the defendant's] Sixth Amendment right may be violated."

688 So.2d at 279-80.

Our October 2, 1998, opinion, authored by Judge Montiel, cited Williams v. City of Phenix City, 659 So.2d 1004 (Ala.Cr.App. 1995), a case that preceded Jowers, as precedent for its holding that Shelton had a Sixth Amendment right to counsel. In Williams, this court held that a conditionally suspended sentence of imprisonment could not be imposed on an indigent defendant who had been denied counsel. However, in that case, the trial court conditioned the defendant's release on the payment of the imposed fines and costs, and the defendant's inability to pay resulted in actual imprisonment. While Shelton's suspension was also conditioned on the payment of fines and court costs, there is no indication in the record that he was ever actually confined because of an inability to pay.

The October 2, 1998, opinion also cited Culberson v. State, 709 So.2d 1327 (Ala.Cr.App.



1997). In Culberson, the defendant, acting pro se, pleaded guilty to two counts of reckless endangerment and one count of harassing communications; he was sentenced to 12 months' confinement for each count, the sentences to run concurrently. The sentences were suspended, and Culberson was placed on 24 months' supervised probation. On the issue whether the trial court erred in not advising Culberson of his right to counsel, this court acceded to the State's request and remanded the case to the trial court for a hearing to determine Culberson's indigence, to determine whether Culberson was properly advised of his right to counsel, and to determine whether he waived his right to counsel.[1] In doing so, this court relied only on Williams, and completely ignored its more recent application of Argersinger, Scott, and Salter in Jowers.

This court will not apply the holding in Williams in a situation where there is no evidence in the record that the appellant has actually been deprived of liberty because of the conditions of release from confinement. When the record reflects that the appellant received a suspended sentence of confinement for a misdemeanor conviction and was never subjected to actual imprisonment, this court's holding in Jowers is the correct interpretation of the law concerning a defendant's Sixth Amendment right to counsel. Unless an appellant has actually suffered a

---

[1] The case was also remanded for the trial court to vacate the sentence ordering 12 months' confinement and imposing $750 fine on the conviction for harassing communications, a Class C misdemeanor, and to resentence Culberson on that count because the sentence exceeded the limitations provided by statute (three months' confinement and a $500 fine).

deprivation of liberty, there is no Sixth Amendment right to counsel in a misdemeanor prosecution in which a sentence was suspended. We will not reverse the trial court "on the mere possibility that, at a remote and future date, [Shelton's] Sixth Amendment right may be violated" by a later attempt to revoke his probation and impose a sentence of confinement. Jowers, 688 So. 2d at 280.

It is certainly the "best practice" for all trial courts when disposing of misdemeanor cases to fully advise defendants of their rights and to obtain signed waivers of the right to counsel. Nevertheless, extending all the protections afforded defendants facing felony charges to those misdemeanor defendants who are not in danger of being incarcerated would be a huge leap from the current state of the law in Alabama. It is time for this court to reapply the holdings in Salter and Jowers. We herby [sic] overrule Williams and Culberson, to the extent that those opinions hold that a misdemeanor defendant is entitled to counsel if the defendant is sentenced to conditionally suspended confinement, regardless of whether the defendant is actually incarcerated.

Because Shelton never was actually imprisoned, he had no Sixth Amendment right to counsel, and there was no requirement for the trial court to inform him of such a right or to determine whether he intelligently waived such a right. The trial court did not err when it did not conduct an inquiry to determine Shelton's indigence and, had it found Shelton indigent, to advise him of the right to appointed counsel or to determine whether Shelton was affirmatively waiving such a right.



II.

Shelton contends that his lack of arraignment invalidates his conviction. Specifically, Shelton argues that Rule 14.1(c), Ala.R.Crim.P., governs the trial court and affirmatively requires arraignment in an appeal de novo to a circuit court. We agree, but because Shelton failed to object to his lack of arraignment, he waived arraignment by remaining silent. See Johnston v. City of Irondale, 671 So.2d 777, 779 (Ala.Cr.App. 1995) (defendant appealed to the circuit court for a trial de novo and waived arraignment by failing to object to his lack of arraignment); Singleton v. City of Tuscaloosa, 557 So.2d 565, 566 (Ala.Cr.App. 1990) (citing Watts v. State, 460 So.2d 204 (Ala. 1983)). Moreover, the purpose of arraignment is to ensure that the accused is familiar with the charges brought against him. See Singleton, 557 So.2d at 567. Because Shelton was tried in the district court for the same charge, he was familiar with the charge brought against him in the circuit court. In addition, Shelton testified that he remembered pleading not guilty in the district court to third-degree assault. (Supp. R. 42.)

III.

Shelton alleges that the State prosecuted him for third-degree assault in an effort to compel him to pay the victim, Kenny Campbell, for property damage

to Campbell's car.[2] At the close of a preliminary hearing, the trial judge asked the parties if they had any further matters to discuss before trial. The State responded:

"Nothing further, Judge, except that [Kenny Campbell] just wants his truck paid for and he is willing to accept payment for his truck and go on about his business. If Mr. Shelton might be willing to do that."

(R. 8-9.) The trial judge stated that he refused to get involved in settling a civil case and instructed the parties that he would hear only evidence concerning the alleged assault. (R. 9.) Shelton argues that the State's remarks indicated that the motivation for prosecuting Shelton was to collect a private debt.

Shelton failed to properly preserve this issue for review. Shelton should have objected when the State made these remarks or filed a motion to dismiss, asserting this ground. See King v. State, 401 So.2d 226, 232 (Ala.Cr.App. 1981); Harris v. State, 378

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[2] The record indicates that prior to the physical confrontation between Shelton and Campbell, Shelton and Campbell were involved in an automobile collision, which resulted in damage to Campbell's car. (R. 17-21.) Campbell allegedly unsuccessfully attempted to obtain reimbursement from Shelton for the damage. (R. 22-24.) The State presented evidence showing that Campbell went to a store where Shelton worked to gain information about Shelton's insurance company. Shelton's son began "slugging" Campbell. While Shelton's son and another man held Campbell, Shelton repeatedly hit Campbell in the ribs and the face. (R. 25-27.)



So.2d 257, 262 (Ala.Cr.App. 1979). Even if Shelton had properly preserved this issue, his argument is without merit. This prosecution did not arise because Shelton allegedly owed Campbell money; it arose because Shelton punched Campbell with his fists, in violation of §13A-6-22, Ala. Code 1975. See Holland v. State, 440 So.2d 1236 (Ala.Cr.App. 1983).

IV.

After the jury began its deliberations, a juror sent a note to the trial judge asking, "Was the fact that Mr. Shelton did not take any action to resolve this problem -- could that be abetting the action in the altercation?" (C. 80.) Upon receipt of the note, the trial judge stated that he would recharge the jury on the concepts of aiding and abetting in an effort to solve the confusion. (R. 158.) Both the State and Shelton agreed to the supplemental charge. (R. 159.) After the trial judge recharged the jury, Shelton informed the trial judge that he was satisfied with the supplemental charge. (R. 162.)

On appeal, Shelton contends that the trial judge did not adequately respond to the juror's inquiry. Shelton has waived this issue because he failed to object to the trial judge's supplemental instruction. See Murphy v. State, 641 So.2d 1256, 1260 (Ala.Cr.App. 1993). Moreover, at trial, Shelton stated that he was satisfied with the instruction.

V.

During a preliminary hearing, the State made a motion in limine, requesting that Shelton be prohibited from referring to, during his opening statements, a prior conviction of Kenny Campbell, the victim, for possession of a [sic] marijuana. (R. 3.) The trial judge granted the State's motion, holding that Shelton could not refer to the evidence in his opening

statement but that he could try to admit the evidence to impeach Campbell when Campbell testified. (R. 5-6.) Shelton argues that the trial judge's ruling denied him his right to include a statement of what he expected the evidence to show in his opening statement.

A trial judge's decision to grant or deny a motion in limine is within the judge's sound discretion. See Zasadil v. City of Montgomery, 594 So.2d 231, 232 (Ala.Cr.App. 1991); Primm v. State, 473 So.2d 1149, 1158 (Ala.Cr.App. 1985). Moreover, the scope of an opening statement rests "within the sound discretion of the trial judge." Hunt v. State, 659 So.2d 933, 941 (Ala.Cr.App. 1994). The trial judge did not abuse his discretion by preventing Shelton from referring to the convictions in his opening statement because Shelton's argument is without merit. The purpose of an opening statement is for " 'each party to give the jury an overview of what the evidence will show.' " Frazier v. State, [Ms. CR-95-2222, January 15, 1999] ___ So.2d ____, ____ (Ala.Cr.App. 1999) (quoting McKinney v. State, 654 So.2d 95, 98 (Ala.Cr.App. 1995)).

In his brief, Shelton contends that he should have been able to refer to the prior conviction because the main issue was the credibility of Campbell, the victim. He cites Rule 609(a)(1), Ala.R.Evid., as authority. Shelton, however, has misconstrued Rule 609. Rule 609 does provide for a method of attacking the credibility of a witness with prior convictions. See Baxter v. State, 723 So.2d 810, 819 (Ala.Cr.App. 1998); Rule 404(a)(3), Ala.R.Evid. (listing Rule 609 as a valid form of impeachment). The credibility of a witness, however, is not at issue until the witness actually takes the stand to testify. See Rule 404(a)(3), Ala.R.Evid., Advisory Committee's Notes (citing C. Gamble, Character Evidence: A Comprehensive



Approach 56 (1987)); C. Gamble, McElroy's Alabama Evidence, §140.01(1)(a) (5th ed. 1996). Thus, the trial judge correctly granted the State's motion in limine, prohibiting Shelton from referring to the prior conviction until Campbell testified.

VI.

Shelton contends that the trial court erred when it failed to grant his motion for a mistrial, which he made during the testimony of Officer Debbie Barnett. Shelton called Officer Barnett as a witness in an effort to elicit testimony concerning a prior complaint Shelton filed against Campbell. (R. 86.) The record indicates that the officer was unsure of the subject matter of her testimony. In fact, her testimony showed that she thought she was being called to testify for another case. During Shelton's direct examination of Officer Barnett, the following occurred:

"[SHELTON]: Ms. Barnett, I'm Lereed Shelton from Mountaintop -- did they ever approach you about swearing a warrant out or getting charges brought against Mr. Kenny Campbell?

"[OFFICER BARNETT]: This [case concerns] Mr. Campbell?

"[SHELTON]: Yes.

"[OFFICER BARNETT]: I'm sorry, Mr. Shelton. I thought this [case] was [about] the assault charge that Michael Sanders made against you back in -- when I took the picture back in 1994, which is not on this case. I'm sorry.

"[DEPUTY DISTRICT ATTORNEY]: May we approach the bench?

"THE COURT: All right.

"UNIDENTIFIED WITNESS: That is on a sexual abuse case, a case with my daughter.

"[OFFICER BARNETT]: No, not on this one, that's another one.

"[SHELTON]: I object.

"[OFFICER BARNETT]: That's not the same one. That's another one.

"THE COURT: Wait a minute. Time out.

"[SHELTON]: I would like a mistrial."

(R. 84-85.) A sidebar discussion followed, and Shelton told the trial judge his purpose for calling Officer Barnett to testify. Shelton seems to have based his motion for a mistrial on the ground that Officer Barnett's answer was nonresponsive. (R. 86.) The trial judge sustained Shelton's objection, striking the response from the record, but the trial judge did not rule on Shelton's motion for a mistrial.

Absent a timely objection and an adverse ruling, nothing is preserved for appellate review. See Pace v. State, 714 So.2d 332, 334 (Ala. 1997) (citing Biddie v. State, 516 So.2d 846 (Ala. 1997)). The portion of the record reproduced above indicates that Shelton failed to obtain an adverse ruling on his motion. It is the appellant's duty to preserve an issue by obtaining an adverse ruling on the record. See Berryhill v. State, 726 So.2d 297, 302 (Ala.Cr.App. 1998). Shelton made no effort to elicit an adverse ruling; thus, this issue is procedurally barred from our review. Moreover, Shelton neither requested nor objected to the trial



judge's failure to give a curative instruction. See Goodwin v. State, [Ms. CR-96-0574, August 14, 1998] ___ So.2d ___, ___ (Ala.Cr.App. 1998); Davis v. State, [Ms. CR-96-2341, May 29, 1998] ___ So.2d ___, ___ (Ala.Cr.App. 1998).

VII.

Shelton argues that the trial judge misinformed him, during his sentencing hearing, about the period that Shelton had for filing post-trial motions. He claims that this misinformation violated his due process rights. After the trial judge sentenced Shelton, the trial judge instructed him as follows:

> "You have the right to appeal the case, if you want to, to the Court of Criminal Appeals, and if you want to do that, you have got to do it within 42 days, counting today. If you cannot afford an attorney or a transcript and you can show that you are indigent, then we would appoint you an attorney and furnish you with a free transcript. You are free to file any post trial motions and appeal, but you must do so within 42 days. Do you understand that?"

(R. 168.) In his brief, Shelton claims that he understood the trial judge to be instructing him that he had 42 days to file a post-trial motion, instead of 30 days, which is the correct number of days. See Rule 24, Ala.R.Crim.P. This issue is moot because the record does not show that Shelton attempted to file any post-trial motions after 30 days.

VIII.

Shelton contends that the trial judge improperly ordered him to pay restitution. Specifically, Shelton argues that a trial judge must hold a restitution

hearing, which did not occur in this case, before the judge can order the accused to pay restitution. Shelton correctly cites §15-18-67, Ala. Code 1975, in support of his argument. He failed, however, to properly preserve the issue for appellate review. Shelton should have objected at trial to the trial judge's failure to conduct a restitution hearing. See Perkins v. State, 715 So.2d 888, 892 (Ala.Cr.App. 1997); Dollar v. State, 687 So.2d 207, 208 (Ala.Cr.App.), rev'd on other grounds, 687 So.2d 209 (Ala. 1996).

IX.

Shelton argues that the trial court committed reversible [sic] when it failed to give Shelton the opportunity to make a statement in his own behalf prior to imposing the sentence. Rule 26.9(b)(1), Ala.R.Crim.P., mandates that a trial court give a defendant an opportunity to make a statement in his behalf before the imposition of his sentence. See, also, Davis v. State, [Ms. CR-97-2301, March 26, 1999] ___ So.2d ____, ____ (Ala.Cr.App. 1999). All defendants are "entitled to an allocution, regardless of the gravity of the sentence imposed." Id. (citing Rule 26.9, Ala.R.Crim.P., Committee Comments). Moreover, the failure to afford a defendant an allocution renders his sentence erroneous. See Lancaster v. State, 638 So.2d 1370, 1373 (Ala.Cr.App. 1993).

The judgment order contained in the record indicates that Shelton was afforded an allocution, but the transcript of the sentencing hearing does not show that Shelton was afforded that opportunity before the trial judge imposed sentence. (C. 16; R. 164-67.) In reading the transcript of the sentencing hearing, we note that Shelton did make comments and express concerns to the trial court. Before the imposition of sentence, the trial judge asked Shelton and the district



attorney about the sentence that Eddie Shelton, Shelton's son, had received for the same assault. The following occurred,

> "[SHELTON]: That case don't have anything to do with this one, your Honor. Why should –
>
> "THE COURT: Well, I know. I'm just trying to set the sentence now. The jury -- $516.69 is what is in the evidence.
>
> "[STATE]: That is what we would submit then.
>
> "THE COURT: Okay. Thirty days suspended, $516.69 restitution, $500 fine, which is what [the trial judge in Eddie Shelton's case] did.
>
> "[SHELTON]: That is not what the other sentence was.
>
> "THE COURT: Well, this is a whole new day. You got a new day in court. I can set the sentence. I can give you a year ... and not suspend the sentence.
>
> "[SHELTON]: Okay.
>
> "THE COURT: But I'm not going to do that. Thirty days suspended, $500 fine, $516.69 restitution.
>
> "[STATE]: Two years' unsupervised probation?
>
> "THE COURT: Yes, unsupervised probation. Anything further?"

(R. 166-67.) Although the transcript indicates that the trial judge allowed Shelton to make statements during his sentencing, the trial judge failed to make it clear that Shelton had a right to make a statement in his behalf to the court. This opportunity is absolutely required. See Rule 26.9(b)(1), Ala.R.Crim.P., Committee Comments; Burks v. State, 600 So.2d 374, 382 (Ala.Cr.App. 1991). Even though the trial judge was not required to invoke any "magic" words, the transcript does not make it clear that Shelton understood that he had a right to make a statement as to why his sentence should not have been imposed. See Jones v. State, 555 So.2d 333, 336 (Ala.Cr.App. 1989) (stating that even though the trial judge did not use any magic words, the record reflects that the defendant was, in fact, given the opportunity to make a statement). Because the transcript does not clearly indicate that Shelton was aware of this right, a discrepancy exists between the transcript and the judgment order; therefore, this case must be remanded to the trial court to determine if Shelton was afforded allocution. See Davis, supra; Burks, 600 So.2d at 383. If the trial court determines that Shelton was not given the opportunity to make a statement in his behalf before the imposition of his sentence, the trial court must conduct a new sentencing hearing and allow for a proper allocution. The trial court shall take all necessary action to allow return to remand to be filed with this court within 42 days of the date of this opinion.

X.

Shelton contends that his trial was unfair because of the cumulative effect of the trial judge's rulings, the prosecutor's conduct, and the conduct of the prosecution's only witness, Campbell. Specifically, Shelton argues that he should be granted a new trial



because (1) he was not represented by counsel, (2) he was never arraigned, (3) he was not fully informed of the charges against him or his possible range of punishment, (4) the district attorney's complaint against him was insufficient, (5) the trial judge improperly restricted the scope of his opening statement, (6) the trial judge's preliminary instructions to the jury did not properly characterize the charge against him, (7) Campbell's self-serving statements during his testimony prejudiced Shelton, (8) the prosecutor improperly asked Campbell leading questions during direct examination, (9) the trial judge failed to instruct the jury to disregard the unresponsive statement made by Officer Barnett, (10) the trial judge did not properly respond to the jury's inquiry during deliberations, (11) he was not afforded allocution, and (12) the trial judge incorrectly informed him that he had 42 days in which to file any post-trial motions.

We have addressed Shelton's issues 1, 2, 5, 9, 10, 11, and 12 in this opinion. In addition, we addressed Shelton's fourth issue in our first opinion dealing with this case. See Shelton v. State, [Ms. CR-97-1313, October 2, 1998] ___ So.2d ____, ____ (Ala.Cr.App. 1998).

Shelton contends that he was not fully informed of the charge against him or of the possible range of punishment. Shelton has failed to preserve either issue for review. See Biddie, 516 So.2d at 847. In addition, Shelton was not entitled to be informed of the maximum and minimum possible punishment, because he did not enter a guilty plea. Moreover, Shelton tried his case in the district court before appealing for a trial de novo in the circuit court; thus, he was well aware of the charge against him.

Shelton did not properly preserve his argument that the trial judge's preliminary instructions to the

jury improperly characterized the charge against him. No objection appears on the record. See Rule 21.3, Ala.R.Crim.P.; Phillips v. State, 726 So.2d 292, 293 (Ala.Cr.App. 1998). Moreover, Shelton's claim is without merit. A review of the instructions indicates that the trial judge did nothing more than explain the elements of assault in the third degree, as defined in §13A-6-22, Ala. Code 1975, and recite the charge as alleged in the complaint. (R. 12-14.) These instructions did not mischaracterize third-degree assault.

Shelton argues that his trial was prejudiced by what he says was Campbell's self-serving testimony during direct and cross-examination. Shelton failed to preserve this issue for review because he failed to object on this basis at any point during Campbell's testimony. See Biddie, 516 So.2d at 847. Shelton also contends that the prosecutor improperly asked Campbell leading questions during direct examination, but he failed to preserve the issue by objecting to the manner of questioning on this ground. See id.

For the above-mentioned reasons, Shelton's conviction of assault in the third-degree is due to be affirmed and the case remanded to ensure that Shelton was afforded allocution.

AFFIRMED AS TO CONVICTION AND REMANDED.

McMillan and Fry, JJ., concur. Baschab, J., dissents with opinion in which Long, P.J., joins.

BASCHAB, J., DISSENTING.

I disagree with the majority opinion, which holds that there is no right to counsel in a



misdemeanor case when a trial court imposes a sentence of imprisonment and then suspends that sentence or places the defendant on probation. The majority states that "extending all the protections afforded defendants facing felony charges to those misdemeanor defendants who are not in danger of being incarcerated would be a huge leap from the current state of the law in Alabama." However, a defendant whose sentence has been suspended or probated is in danger of being incarcerated because the court retains the authority to revoke a suspended or probated sentence and to reinstate the remaining term of imprisonment. Therefore, I maintain the position I advanced in my dissent in Benson v. City of Sheffield, [Ms. CR-98-0280, April 30, 1999] ___ So.2d ____ (Ala. Cr. App. 1999), that a defendant facing a suspended or probated sentence is entitled to counsel. Because I believe that the appellant had a right to counsel and because the record does not reflect that the trial court advised the appellant of his right to withdraw his waiver of counsel, I believe this case should be remanded for a new trial. See Farid v. State, 720 So.2d 998, 999 (Ala. Cr. App. 1998). Therefore, I must respectfully dissent.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 300 DEXTER AVENUE
P.O. BOX 301555
MONTGOMERY, AL 36130-1555

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Hon. Billy Yates, Circuit Clerk

Hon. William H. Mills, Attorney

Lereed Shelton, Pro Se

RE: CR-97-1313
Lereed Shelton v. State of Alabama (Appeal from Etowah Circuit Court: CC97-365).

Dear Sir or Madam:

You are hereby notified that on September 24th, 1999 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for rehearing overruled. 39(k) Motion Denied.

Lane W. Mann
Clerk
Court of Criminal Appeals



NOTICE: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

**SUPREME COURT OF ALABAMA**

**OCTOBER TERM, 1999-2000**

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**1990031**

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Released May 19, 2000

**Ex parte Lereed Shelton**

**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS**

**(Re: Lereed Shelton**
**v.**
**State)**

**(Etowah Circuit Court, CC-97-365;**
**Court of Criminal Appeals, CR-97-1313)**

JOHNSTONE, Justice.

In district court Lereed Shelton was convicted of assault in the third degree, a violation of §13A-6-22, Ala. Code 1975. The district court ordered him to pay a $500 fine and $333.75 as restitution to the victim. Shelton appealed for a trial de novo in circuit court. Pursuant to a jury trial during which Shelton represented himself, Shelton was convicted of assault in the third degree. The sentence of the trial court imposed 30 days' imprisonment, a $500 fine, restitution of $516.69 payable to the victim, and court costs. The trial court, however, suspended the 30 days' imprisonment, placed Shelton on probation, and imposed certain conditions, including timely payment of the sums ordered.

Shelton appealed to the Court of Criminal Appeals, which, holding that he did have a constitutional right to counsel because he had received a sentence to suspended imprisonment, remanded his case for the trial court to determine whether Shelton made a knowing, intelligent, and voluntary waiver of his right to counsel. Shelton v. State, [Ms. CR-97-1313, October 2, 1998] ___ So. 2d ____ (Ala. Crim. App. 1998). On remand, the trial court conducted a hearing at which Shelton was represented by counsel. Shelton testified that he was not informed that he had a right to counsel and that he was not asked whether he wanted to be represented by counsel. He also testified that he was not informed that he could possibly serve time in jail for his conviction. On cross-examination, Shelton stated that he was aware he could be represented by counsel if he "went and paid the money" to hire a lawyer. He stated further that he believed that the trial court would consolidate his case with his son's case and that they would share the same lawyer. The record does not contain evidence that anyone told Shelton that the trial court would appoint a lawyer to represent him if



he could not afford one. The prosecutor argued that, although the record did not reflect that anyone informed Shelton of his right to counsel and that he waived his right, Shelton was aware of his right to counsel because he was present when his son, who was Shelton's codefendant, was informed of his right to counsel and because the trial court warned Shelton throughout the proceedings that he needed a lawyer. The prosecutor stated further that Shelton did a "very good job of representing himself."

Thereafter, trial court entered the following order:

> "1. Although [Shelton] never made a statement on the record specifically waiving his right to counsel, it is the opinion of this Judge that [Shelton] fully understood his right to employ counsel and in fact did a creditable job of defending his own case both at the District and Circuit Court levels.
>
> "2. Repeatedly during the trial of his case, the Court informed [Shelton] about the problems of him representing himself and the fact that he was a lay person would not allow him to circumvent the rules of evidence.
>
> "3. [Shelton] appeared to be an intelligent, articulate, shrewd businessman fully aware of what was going on in the courtroom and aware of the criminal charge against him and the possibilities of punishment (he was found guilty in District Court and received a fine and ordered to pay restitution)."

The trial court does not state in this order that it actually informed Shelton of his right to counsel. The

trial court does not state that it informed Shelton that the court would appoint a lawyer to represent him if he could not afford to hire a lawyer.

On return to remand, the Court of Criminal Appeals, citing the United States Supreme Court in Argersinger v. Hamlin, 407 U.S. 25 (1972), and Scott v. Illinois, 440 U.S. 367 (1979), held that Shelton did not have a constitutional right to counsel because his sentence was suspended and he was not actually imprisoned.[3] After the Court of Criminal Appeals overruled Shelton's application for rehearing and denied his Rule 39(k), Ala. R. App. P., motion, he petitioned this Court for a writ of certiorari. We granted Shelton's petition to determine the following: 1) whether Shelton had a constitutional right to counsel even though he was never actually imprisoned; 2) whether Shelton knowingly, intelligently, and voluntarily waived his right to counsel; and 3) whether the trial court denied Shelton his right to a restitution hearing in violation of §15-18-67, Ala. Code 1975.

In concluding, in this second opinion, that Shelton did not have a constitutional right to counsel, the Court of Criminal Appeals relied on the following holding of the United States Supreme Court in Argersinger v. Hamlin, 407 U.S. at 37-40:

> "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or

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[3] The Court of Criminal Appeals affirmed Shelton's conviction, but remanded for the trial court to conduct a new sentencing hearing and to allow Shelton the right to allocution.



> felony, unless he was represented by counsel at his trial.
>
> "....
>
> "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.
>
> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of the [sic] 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy."

This Argersinger holding necessarily requires a court reviewing a claim of violation of a defendant's right to counsel to determine the existence of the right retroactively on the basis of the sentence imposed on the unrepresented defendant.

The defendant in Argersinger was convicted, without the aid of counsel, of the misdemeanor offense of carrying a concealed weapon. He was sentenced to 90 days in jail. The Court held that, because the defendant had been imprisoned and had suffered an actual loss of liberty, he was entitled to representation by counsel. The Court did not address the issue of a defendant's right to counsel when no loss of liberty has occurred. Argersinger, 407 U.S. at 37.

In another case, Scott v. Illinois, supra, the United States Supreme Court considered the right to counsel of an indigent defendant who was convicted of shoplifting, a crime punishable by a maximum fine of $500 or by a maximum term of imprisonment of one year, or by both. The defendant was fined $50, but was not sentenced to any term of imprisonment. In that case, the Court concluded that the defendant was not entitled to appointed counsel:

> "[W]e believe that the central premise of Argersinger -- that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment -- is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. ... We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."



440 U.S. at 373. (Emphasis added.)[4]

Neither Argersinger nor Scott addresses the issue currently before us -- whether a suspended or probated sentence to imprisonment constitutes a "term of imprisonment." However, some federal and state courts have interpreted Argersinger and Scott to mean that a defendant who is convicted, without the aid of counsel, of a misdemeanor offense and is sentenced to a term of imprisonment which is suspended or probated, does not have a right to appointed counsel because the defendant was not "actually imprisoned." See People v. Reichenbach, 459 Mich. 109, 587 N.W.2d 1 (1998); Layton City v. Longcrier, 943 P.2d 655 (Utah App. 1997); Griswold v. Commonwealth, 252 Va. 113, 472 S.E.2d 789 (1996); State v. Hansen, 273 Mont. 321, 903 P.2d 194 (1995); United States v. Smith, 56 F.3d 66 (6th Cir. 1995); United States v. Castro-Vega, 945 F.2d 496 (2d Cir. 1991); United States v. Nash, 703 F. Supp. 507 (W.D. La.), aff'd, 886 F.2d 1312 (5th Cir. 1989); State v. Sanchez, 94 N.M. 521, 612 P.2d 1332 (N.M. App.

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[4] The United States Supreme Court expounded further on the requirement that a defendant must be "sentenced to a term of imprisonment" in Nichols v. United States, 511 U.S. 738, 749 (1994), which held that "an uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." Nicholas overruled Baldasar v. Illinois, 446 U.S. 222 (1980), which held that a prior uncounseled misdemeanor conviction, constitutional under Scott, could not be used to enhance a second misdemeanor conviction to a felony conviction.

1980); and Cottle v. Wainwright, 477 F.2d 269 (5th Cir.), vacated on other grounds, 414 U.S. 895 (1973).

On the other hand, other courts have held that an indigent defendant who receives a conditionally suspended or probated sentence to imprisonment is entitled to representation by appointed counsel because that defendant has been "sentenced to a term of imprisonment." United States v. Reilley, 948 F.2d 648 (10th Cir. 1991); United States v. Foster, 904 F.2d 20 (9th Cir. 1990); United States v. Sultani, 704 F.2d 132 (4th Cir. 1983); United States v. Leavitt, 608 F.2d 1290 (9th Cir. 1979); and United States v. White, 529 F.2d 1390 (8th Cir. 1976). For example, in Reilley, the defendant was charged with leaving property unattended in a national park for longer than 24 hours in an undesignated area, a crime punishable by a maximum fine of $500 or by a maximum term of imprisonment of six months or by both. The defendant established his indigence and requested appointed counsel, but the trial court denied his request. He was convicted and was sentenced to 30 days' imprisonment, suspended on the condition that he timely pay his $500 fine. In vacating the defendant's 30-day prison sentence, the Reilley court reasoned:

> "If a defendant cannot be ordered to serve a sentence of imprisonment, it seems obvious that a conditional sentence of imprisonment is equally invalid. Since the court's conditional threat to imprison Reilley could never be carried out, the threat itself is hollow and should be considered a nullity."

Applying the rationale of Reilley, Argersinger, and Scott, we hold that the defendant in this case was entitled to representation by counsel because he was



sentenced to a term of imprisonment, albeit suspended. We do not conclude that a defendant convicted of a petty or misdemeanor offense can establish a violation of his right to counsel when the defendant has not been sentenced to a term of imprisonment. For these reasons, we reverse the holding of the Court of Criminal Appeals that a defendant sentenced to conditionally suspended incarceration for a misdemeanor conviction but not actually incarcerated, does not (retroactively) have a right to counsel. Furthermore, we hold that the Court of Criminal Appeals improperly overruled Williams v. City of Phenix City, 659 So. 2d 1004 (Ala. Crim. App. 1995), and Culberson v. State, 709 So. 2d 1327 (Ala. Crim. App. 1997), which hold that a conditionally suspended or probated sentence of incarceration cannot be imposed on an indigent defendant who has been denied his right to counsel.[5]

Our inquiry does not end with the determination that Shelton had a right to counsel. We must determine whether the defendant effectively waived his right to counsel in this case. A defendant may not be imprisoned for any offense, whether a petty, misdemeanor, or felony offense, unless the defendant either had counsel or made a knowing, intelligent, and voluntary waiver of his right to counsel. Argersinger, 407 U.S. at 37. "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected

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[5] We note further that the holding of the Court of Criminal Appeals in Benson v. City of Sheffield, 737 So. 2d 1059 (Ala. Crim. App. 1999), is improper for the same reasons stated in this opinion.

the offer." Carnley v. Cochran, 369 U.S. 506, 516 (1962). See Lake v. City of Birmingham, 390 So. 2d 36 (Ala. Crim. App. 1980). To establish a knowing and intelligent waiver of counsel, "the record at the outset of the trial should establish three factors: 1) that the defendant was informed that he had the right to counsel, 2) that the defendant was informed that if he could not afford counsel the state would appoint counsel to represent him, and 3) an affirmative showing by the defendant that, understanding these rights, he still elects to proceed without counsel." Jenkins v. State, 482 So. 2d 1315, 1317 (Ala. Crim. App. 1985).

The record fails to establish that Shelton "was offered counsel" as required by Carnley, supra. Likewise the record fails to establish any of the three factors required by Jenkins, supra. The trial judge's admonitions to Shelton to the effect that he needed a lawyer are a far cry from explanations of the right to counsel or offers of appointed counsel if Shelton could not afford to retain counsel. Therefore, we cannot say that Shelton intelligently and understandingly waived his right to counsel.

Shelton claims also that he was denied his right to a restitution hearing pursuant to §15-18-67, Ala. Code 1975. The Court of Criminal Appeals held that Shelton did not preserve this issue for appellate review because he did not object at the original sentencing hearing to the trial court's failure to conduct a restitution hearing. Perkins v. State, 715 So. 2d 888, 892 (Ala. Crim. App. 1997); Dollar v. State, 687 So. 2d 207, 208 (Ala. Crim. App.), rev'd on other grounds, 687 So. 2d 209 (Ala. 1996). We agree. During neither the original sentencing proceedings nor the first remand proceedings did Shelton request a restitution hearing or object to the trial court's failure to conduct a restitution hearing. He did not make any argument



that the restitution was not supported by the evidence. Cf. Ex parte Clare, 456 So. 2d 357, 359 (Ala. 1984) (holding that defendant's argument regarding the amount of restitution ordered was preserved for appellate review even though defendant did not object during the restitution hearing because defense counsel "made known to the [trial] court his disagreement with the State concerning the amount of restitution"). Shelton did not present this issue concerning a restitution hearing to the trial court until the commencement of the second remand proceedings. Because Shelton did not timely raise this issue before the trial court for its consideration, this issue has not been properly preserved for our review. Moreover, during the trial, the State presented medical bills showing that the victim owed $516.69 for treatment for injuries he suffered as a result of the assault by Shelton. Shelton had ample opportunity to present evidence to dispute the restitution amount.

Having held that a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel, and having found that Shelton did not intelligently and understandingly waive that right and that he suffered a deprivation of that right, we affirm Shelton's conviction but reverse that aspect of his sentence imposing 30 days of suspended jail time. The remaining aspects of the sentence are affirmed. We remand this cause to the Court of Criminal Appeals for that court to remand with instructions to the trial court to vacate that aspect of Shelton's sentence imposing the suspended jail time.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hooper, C.J., and Houston, Cook, Lyons, and England, JJ., concur.

Maddox, J., dissents.

Brown, J., recuses herself.*

* Justice Brown was a member of the Court of Criminal Appeals when that court considered this case.

MADDOX, Justice (dissenting).

I see no need to reach the question whether Shelton was entitled to counsel in this case because I believe that, even if he had that right, he waived it, as the trial court determined on remand from the Court of Criminal Appeals.

I recognize that, as the main opinion states, "[a] defendant may not be imprisoned for any offense, whether a petty, misdemeanor, or felony offense, unless the defendant either had counsel or made a knowing, intelligent, and voluntary waiver of his right to counsel ." ___ So. 2d at ____. I also agree that we may not presume waiver of this important right from a silent record, see Carnley v. Cochran, 369 U.S. 506, 516 (1962), but I respectfully disagree with the proposition that the record in this case is silent as to the question of waiver.

The record shows that the Court of Criminal Appeals had remanded this case for the trial court to determine whether Shelton had intelligently and knowingly waived his right to counsel. At the trial court's hearing on that question, the State argued that during his prosecution Shelton was repeatedly told of his right to counsel and nevertheless chose to



represent himself. Based on that argument, the trial court entered an order finding that Shelton had waived his right to counsel.

Under the facts of this case, I am reluctant to question the judgment of the trial court. Furthermore, because the defendant received only a suspended sentence and was not incarcerated, I do not believe that he, in fact, had a right to counsel. Consequently, I respectfully dissent.

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**SUPREME COURT OF ALABAMA**

**OCTOBER TERM, 1999-2000**

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**1990031**

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Released October 27, 2000

**Ex parte Lereed Shelton**

**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS**

**(Re: Lereed Shelton v. State)**

**(Etowah Circuit Court, CC-97-365; Court of Criminal Appeals, CR-97-1313)**

On Application for Rehearing

JOHNSTONE, Justice.



**APPLICATION OVERRULED; OPINION MODIFIED [BY SUBSTITUTION OF PAGES 6 AND 7].**

**Hooper, C.J., and Houston, Cook, Lyons, and England, JJ., concur.**

**Maddox, J., dissents.**

**Brown, J., recuses herself.***

***Justice Brown was a member of the Court of Criminal Appeals when that court considered this case.**

**from fines or the mere threat of imprisonment -- is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. ... We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. at 373. (Emphasis**

added.)[6]

Neither Argersinger nor Scott addresses the issue currently before us -- whether a suspended or probated sentence to imprisonment constitutes a "term of imprisonment." However, some federal and state courts have interpreted Argersinger and Scott to mean that a defendant who is convicted, without the

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[6] The United States Supreme Court expounded further on the requirement that a defendant must be "sentenced to a term of imprisonment" in Nichols v. United States, 511 U.S. 738, 749 (1994), which held that "an uncounseled misdemeanor conviction, valid under Scott because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." Nicholas overruled Baldasar v. Illinois, 446 U.S. 222 (1980), which held that a prior uncounseled misdemeanor conviction, constitutional under Scott, could not be used to enhance a second misdemeanor conviction to a felony conviction.

Applying Argersinger and Scott in Ex parte Reese, 620 So. 2d 579, 580 (Ala. 1993), this Court recognized that a defendant has a right to counsel in a misdemeanor case in which the defendant receives a jail sentence. This Court held that, because the defendant was sentenced to six months in jail for a prior misdemeanor possession conviction, he was entitled to counsel in that case; and, therefore, without a showing that the defendant either had counsel or waived his right to counsel, that prior conviction could not be used to enhance his current conviction. 620 So. 2d at 581. Reese did not address the specific issue of whether a defendant who receives a suspended or probated sentence, but is not actually imprisoned, for a misdemeanor conviction is entitled to counsel.



aid of counsel, of a misdemeanor offense and is sentenced to a term of imprisonment which is suspended or probated, does not have a right to appointed counsel because the defendant was not "actually imprisoned." See People v. Reichenbach, 459 Mich. 109, 587 N.W.2d 1 (1998); Layton City v. Longcrier, 943 P.2d 655 (Utah App. 1997); Griswold v. Commonwealth, 252 Va. 113, 472 S.E.2d 789 (1996); State v. Hansen, 273 Mont. 321, 903 P.2d 194 (1995); United States v. Smith, 56 F.3d 66 (6th Cir. 1995); United States v. Castro-Vega, 945 F.2d 496 (2d Cir. 1991); United States v. Nash, 703 F. Supp. 507 (W.D. La.), aff'd, 886 F.2d 1312 (5th Cir. 1989); State v. Sanchez, 94 N.M. 521, 612 P.2d 1332 (N.M. App. 1980); and Cottle v. Wainwright, 477 F.2d 269 (5th Cir.), vacated on other grounds, 414 U.S. 895 (1973).

On the other hand, other courts have held that an indigent defendant who receives a conditionally suspended or probated sentence to imprisonment is entitled to representation by appointed counsel because that defendant has been "sentenced to a term of imprisonment." United States v. Reilley, 948 F.2d 648 (10th Cir. 1991); United States v. Foster, 904 F.2d 20 (9th Cir. 1990); United States v. Sultani, 704 F.2d 132 (4th Cir. 1983); United States v. Leavitt, 608 F.2d 1290 (9th Cir. 1979); and United States v. White, 529 F.2d 1390 (8th Cir. 1976). For example, in Reilley, the defendant was charged with leaving property unattended in a national park for longer than 24 hours in an undesignated area, a crime punishable by a maximum fine of $500 or by a maximum term of imprisonment of six months or by both. The defendant established his indigence and requested appointed counsel, but the trial court denied his request. He was convicted and was sentenced to 30 days' imprisonment, suspended on the condition that he timely pay his $500 fine. In vacating the

defendant's 30-day prison sentence, the Reilley court reasoned:

> "If a defendant cannot be ordered to serve a sentence of imprisonment, it seems obvious that a conditional sentence of imprisonment is equally invalid. Since the court's conditional threat to imprison Reilley could never be carried out, the threat itself is hollow and should be considered a nullity."